No. 92-925

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In The

Supreme Court of the United States

October Term, 1992

CENTRAL BAPTIST THEOLOGICAL SEMINARY,

Petitioner,

vs.

STATE OF MINNESOTA, DEPARTMENT OF NATURAL RESOURCES AND JOSEPH N. ALEXANDER, INDIVIDUALLY AND AS COMMISSIONER OF DEPARTMENT OF NATURAL RESOURCES,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of Minnesota

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the state court decision in this regulatory taking case is in any way inconsistent with *Lucas v. South Carolina Coastal Council.*

2. Whether the Supreme Court of the United States should review the way in which the state court applied the state's law of collateral estoppel.

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On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of Minnesota

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner seeks review of a decision of the Minnesota Court of Appeals rejecting their "regulatory taking" claim. The court ruled against Petitioner because in Minnesota the bundle of property rights associated with riparian and lakebed ownership is limited by state common law to activities that are reasonable and consistent with the public welfare. The court applied that state common law requirement to Petitioner's proposal to build a 550 foot tall radio tower in the middle of Jones

Lake, and found it did not pass muster. Contrary to Petitioner's assertion, the court did not deny compensation on police power grounds. Rather, it ruled that state common law independent of and predating the state's police power laws regarding alteration of waterbodies, militated against the construction of the radio tower in the lake.

The petitioner owns most of the bed of Jones Lake, a 28 acre wetland. It bought this underwater property in 1962 for $100 per acre. It erected a radio tower on adjacent upland it owned, anchoring two of the four guywires which held up the tower, in the bed of the lake near its shore. It transferred ownership of the tower and the upland to a radio company. In 1982 the tower blew down, and changes in the local zoning ordinance prevented reconstruction of the tower on the same site. The petitioner then applied to the Minnesota Department of Natural Resources for a permit to construct a radio tower in the middle of Jones Lake. The permit was denied, the denial was upheld by the State Court of Appeals, and a petition for review was denied by the State Supreme Court. Petitioner then initiated an action in state district court asking for an order directing the state to initiate condemnation proceedings against Petitioner's 25 acre lake parcel, on grounds that it had been denied all reasonable use of the property in contravention of the just compensation clauses of the state and federal constitutions. The district court granted the order. On appeal, the State Court of Appeals reversed, on the ground that putting the radio tower in the lake was not a property right under Minnesota common law which requires that the use of a water body be reasonable and consonant with

the public welfare. The State Supreme Court denied review.

REASONS TO DENY THE PETITION

A writ of certiorari should not issue because Petitioner has failed to show that there are "special and important reasons" for this court to grant discretionary review pursuant to Supreme Court rule 10.

Although the state court's decision was issued before this Court decided *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S. Ct. 2886 (1992), it was based on precisely the sort of existing rules of the state's common law of property recognized in *Lucas*, presenting no conflict with any decision of this or any other federal appellate or state court. Petitioner's argument against the state court's application of collateral estoppel raises a question of state law only, presenting no federal question.

I. THE MINNESOTA COURT OF APPEALS DECISION THAT PETITIONER DID NOT HAVE A PROPERTY RIGHT TO BUILD A RADIO TOWER IN JONES LIKE IS ENTIRELY CONSISTENT WITH THE MOST CURRENT TAKINGS JURISPRUDENCE.

The central premise of petitioner's argument is that the state court based its denial of petitioner's inverse condemnation claim on newly-applied statutory restrictions rather than on the owner's right under the previously-existing common law. Contrary to petitioner's

representations, however, the Minnesota Court of Appeals based its decision on the state's common law of property rights. Because petitioner's central premise is wrong, the petition should be denied.

The state court held that Minnesota's common law of property rights in the beds of water bodies limits those rights to uses which are "reasonable [and] consistent with the public welfare." *Central Baptist Theological Seminary v. State of Minnesota Department of Natural Resources,* 487 N.W.2d 528, 533 (Minn. Ct. App. 1992), rev. denied (Minn. Aug. 27, 1992). The court cited as precedent for its decision *Johnson v. Seifert,* 257 Minn. 159, 100 N.W.2d 694 (1960). In that case a landowner was required to remove a fence he had placed on lakebed that he owned, because it was interfering with the rights of others to use the waterbody. The decision had nothing to do with application of the state's police power; rather, it was based entirely on deeply rooted state common law. For example, *Schaefer v. Marthaler,* 34 Minn. 487, 26 N.W. 726 (1886), established that one riparian owner of a wetland bed does not have a property right to use the wetland in a way (in that case draining it) that injures the riparian rights of another bed owner. One hundred years ago, Chief Justice William Mitchell wrote that the public interest in the state's waterbodies reaches beyond questions of navigability and bed ownership:

> To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated.

Lamprey v. State, 52 Minn. 181, 200 53 N.W. 1139, 1143 (1893). Based on these precedents the state court concluded that the common law existing when petitioner purchased the property restricted its use to those things that are "reasonable [and] consistent with the public welfare." It was this fundamental common law limitation that informed the decision below.

The state court decision is 100 percent consistent with the *Lucas* exception to the categorical requirement for just compensation:

> Where the state seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of this title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the state's power over, the "bundle of rights" that they acquire when they obtain title to the property.

Lucas v. South Carolina Coastal Council, ___ U.S. ___, 112 S. Ct. 2886, 2899 (1992). The state court identified precisely such state common law traditions, in place when petitioner bought the lake bed, "limitations which inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Lucas*, 112 S. Ct. at 2900. The bundle of rights that the Seminary acquired when it bought a portion of the bed of Jones Lake never included the right to install a 550 foot radio tower and its associate guy wires in the middle of the lake, because those rights

were always subject to the "reasonable and consistent with the public welfare" restriction of the common law.[1] In concluding that the proposed radio tower is not "reasonable and consistent with the public welfare," the court ruled that the prior adjudication under the state's police power regulatory statue had already made the same determination. In so ruling, the court was not relying only on the newly-enacted law, however. Instead, it merely found that the new law, in this instance, had resulted in a determination of precisely the same issue of reasonableness and consistency with the public welfare that the pre-existing common law required.

Because the state court relied on pre-existing common law, its decision was consistent with the takings jurisprudence of this Court as reflected in the *Lucas* decision. There is, therefore, no reason to grant the petition.

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[1] Clearly the real estate market at large recognized that the property rights associated with owning the bed of a water body were substantially limited, for the petitioner's purchase price of the property in this commercially zoned area in an inner ring suburb in the Minneapolis/St. Paul metropolitan area was a nominal $100 per acre (hardly an investment commensurate with their claimed expectation). The value of the property would be three quarters of a million dollars if a radio tower could be constructed in it because land zoning in the Twin Cites metropolitan area makes it extremely difficult to find a site where such a tower can be built. The record shows that without a radio tower permit, the property's fair market value is $10,000 – four times what the petitioner paid for it.

II. THE COURT LACKS JURISDICTION TO HEAR PETITIONER'S ARGUMENTS REGARDING THE STATE COURT'S APPLICATION OF THE STATE LAW OF COLLATERAL ESTOPPEL

This Court has no jurisdiction pursuant to 28 U.S.C. section 1257 to review a final decision of a state court unless a federal question has been raised in the state court below. *Illinois v. Gates*, 462 U.S. 213, 218 (1983); *McGoldrick v. Compagnie Generale Transtlantique*, 309 U.S. 430, 434 (1940); *cf. Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 79-80 (1988). The decision of the Minnesota Court of Appeals on the issue of collateral estoppel rests entirely on state law, an adequate and independent state ground raising no federal question. Petitioner's claim that it was thereby deprived of its right to pursue its constitutional claim, is without merit.

A. The State Court Decision Rests Upon an Adequate State Ground.

The state court held that Petitioner was precluded from arguing that putting a radio tower in Jones Lake was reasonable and consistent with the public interest, because the identical issue had been decided already, in *In the Matter of the Application of Central Baptist Theological Seminary*, 370 N.W. 2d 642, (Minn. Ct. App. 1985), rev. denied (Minn. Sept. 19, 1985). (*See* Appendix A-1). In reaching its conclusion, the court ruled on three issues, all of which involve only state law. First it determined that Petitioner's rights were limited at the time of purchase of the property by the "reasonable and consistent with the public welfare" restriction of the common law.

Second, the court decided that the test applied under the more recent statutory provision is the same as the common law limitation. Third, the court ruled that under state principles of collateral estoppel Petitioners were precluded from relitigating that same issue again in the inverse condemnation proceeding. As is apparent, there is no issue of federal law involved in the analysis. The court relied only on state precedent, which makes the issue insulated from review by the U.S. Supreme Court on certiorari. *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 361-362 (1984).

B. The State Court's Application of Collateral Estoppel Did Not Deprive Petitioner of Its Opportunity to Pursue Its Constitutional Claim.

Petitioner's reliance on *Albrecht v. State of Florida*, 444 So. 2d. 8 (Fla. 1984), betrays Petitioner's argument. *Albrecht* holds that a decision upholding the state's denial of a permit under its police power is not *res judicata* as to a subsequent action for just compensation. Respondent agrees entirely with that holding. The Minnesota Court of Appeals did not foreclose Petitioner's inverse condemnation action on grounds of *res judicata*. Rather, it allowed the action, and only precluded *re*litigation of an *issue*. This distinction between *res judicata* and collateral estoppel is recognized in *Albrecht*:

> It is also a settled rule that when the second suit is between the same parties, but based upon a separate cause of action from the first, the prior judgment will not serve as an estoppel *except as*

> *to those issues actually litigated and determined in it.*

Albrecht, 444 So. 2d at 12 (emphasis added). The Minnesota court found that the issue of reasonableness and consistency with the public welfare, as those terms are understood in the state's common law of property rights in the beds of water bodies, were identical with the issues of reasonableness and public welfare raised in the prior different cause of action regarding the state's application of its police power. The state court held that the issue was identical and had been fully and fairly litigated in the prior case. It expressly rejected Petitioner's argument that the common law restraints of "reasonable" and "public welfare" had a different meaning than the same terms did in the state's police power statute:

> We decline any implicit invitation by the Seminary to conclude "reasonable" or "public welfare" under Minn. Stat. section 105.45 signifies anything different than what is "reasonable" or in the "public welfare" in general.

Central Baptist Theological Seminary v. State of Minnesota Department of Natural Resources, 487 N.W.2d 528, 533 (Minn. Ct. App. 1992).[2]

Petitioner's repeated assertion that it was denied an opportunity to make its taking claim, mischaracterizes

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[2] Contrary to petitioner's claim, it is apparent from the language used by the state court that it did indeed rule on the issue whether the test under the common law was the same as the test under the statute. That the court refused to agree with petitioner's argument does not mean that the court did not rule on the issue.

and misrepresents what happened. Its claim was heard, and was denied because " . . . where there is no right, there can be no taking." *Central Baptist*, 487 N.W.2d at 533. Because there was no right under Minnesota common law, there was no need to pursue federal takings analysis, such as whether Petitioner had been denied all use of its property, and whether its expectation was investment-backed. The constitutional claim was not precluded, it was heard, and it was denied on historic state common law grounds separate and independent from the state's police power authority. The application of collateral estoppel is not the collapse of two different causes of action into one. It is simply the recognition that an issue in the present cause of action is the same as the issue in a preceding and different cause of action.

The state court's analysis of this issue is purely one of state law. It raises no federal question.[3] The U.S. Supreme Court does not undertake to correct errors of state courts in applying state law. The state court's conclusion that Petitioner had no property right under state common law to build the radio tower in Jones Lake, is an adequate basis for denying the taking claim and is independent of federal law. Therefore there is not jurisdiction to review the decision. *Michigan v. Long*, 463 U.S. 1032 (1983).

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[3] Nor does Petitioner's claim that the state court erred in applying *Johnson v. Seifert* to Jones Lake. Nevertheless, Respondent notes that Petitioner's assertion is wrong. Jones Lake is exactly the same kind and size of waterbody to which *Johnson v. Seifert* applied. *Bartlett v. Stalker Lake Sportsmen's Club*, 283 Minn. 393, 400, 168 N.W.2d 356, 360 (1969).

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the petition be in all respects denied.

Dated December 29, 1992.

Respectfully submitted,

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APPENDIX A

In the Matter of the Application of CENTRAL BAPTIST THEOLOGICAL SEMINARY for a Permit to Construct a 500 Foot Radio Tower in the Center of Jones Lake, City of New Brighton, County of Ramsey.

No. CO-85-230

Court of Appeals of Minnesota

July 2, 1985

Review Denied Sept. 19, 1985

Syllabus by the Court

1. The seminary does not have an existing right to build a radio tower in Jones Lake.

2. The Commissioner's decision to deny a permit for the tower is supported by substantial evidence.

Roger J. Magnuson, Minneapolis, for appellant.

Hubert H. Humphrey, III, State Atty. Gen., Donald A. Kannas, Sp. Asst. Atty. Gen., St. Paul, for respondent.

Heard, considered and decided by POPOVICH, C.J., and PARKER and FOLEY, JJ.

OPINION

FOLEY, Judge.

Central Baptist Theological Seminary seeks review of an order of the Commissioner of the Department of Natural Resources denying its application for a permit to

construct a radio tower in Jones Lake in New Brighton. The seminary contends: (1) it has an existing right to construct a radio tower in Jones Lake; (2) substantial evidence does not support the Commissioner's decision; and (3) its property has been taken for public use without just compensation.

We affirm.

FACTS

The seminary is a non-profit corporation which operates a non-profit radio station under its call letters WCTS-FM. In the early 1960's, it purchased 25 acres generally underlying Jones Lake for the purpose of constructing a radio tower. It later purchased one and three quarters additional acres of dry land at the northwest corner of the lake for associated facilities.

After determining that it would be considerably more expensive to construct a tower in Jones Lake than on dry land, the seminary sought a special use permit from the City of New Brighton to construct the tower on the one and three quarters acre parcel (adjacent parcel). New Brighton issued one special use permit for the tower and associated transmission building and another for two guy wire anchors for the tower in Jones Lake.

The seminary entered an agreement with Contemporary Radio which provided that the seminary would construct a 460 foot FM radio tower and sell both the tower and the adjacent parcel to Contemporary Radio. Contemporary Radio agreed to provide space on the tower for

the seminary's antenna for 99 years without cost to the seminary.

The seminary constructed the tower and conveyed the property. In 1969, Entercom merged with Contemporary Radio and assumed the contract between the seminary and Contemporary Radio.

The tower was used until August 1980 when it blew over onto an apartment complex in a windstorm. Entercom investigated replacing the tower but abandoned the effort because of increased cost and New Brighton's rejection of its building permit application. New Brighton subsequently amended its zoning ordinances to require increased setbacks for guyed structures.

Since the collapse of Entercom's tower WCTS has been broadcasting from a 130 antenna located at the seminary. It reaches a 10.6 mile radius with 45.5 KW power. It has an assigned capacity of 100 KW from the Federal Communications Commission and seeks to use its assigned capacity by building a radio tower in Jones Lake.

The seminary entered into an agreement with Park Broadcasting Company which is similar to the one it had with Contemporary Radio. The seminary has agreed to lease its acreage in Jones Lake to Park, the owner of several radio stations. Park has agreed to construct a tower and let the seminary install an antenna on the tower. The seminary is responsible for acquiring the necessary approval from the F.A.A. and New Brighton. It agreed to assist Park in obtaining approval from DNR.

The proposed tower would be mounted on a base 48 feet in diameter, roughly in the center of Jones Lake. It would be supported by three sets of guy wires running from the tower to six anchors located 224 and 448 feet from the base. A 700 foot power line and associated messenger cable or cables would be strung at a height of 15 feet above the lake surface from the tower to a transmission building.

Jones Lake is a 28 acre type 4 wetland. In a 1952 survey it was found to be four and one-half feet deep. In a 1962 survey it was found to be approximately the same. Its ordinary high water mark was estimated at six and one-half feet with an area at that depth of 33 acres.

In 1968 or 1969, New Brighton chose to lower the Jones Lake outlet so it would not have to replace culverts. In 1981, the lake was approximately two to two and a half feet deep.

In an August 9, 1978, survey the lake was rated as having very good overall waterfowl habitat with adequate nesting cover, excellent brood cover, and several loafing sites. There were approximately 90 adult mallards, 50 egrets, several great blue and black-crowned night herons, blue-winged teal, and coot and an American bittern. It was reported to the surveyor that a pair of Canadian geese nested in the lake that summer and approximately 200 egrets had been observed at one time. The lake and adjacent shoreline provided habitat for other wildlife including muskrats, pheasants and cottontailed rabbits. Virginia rails, yellow throats and yellow-headed blackbirds were observed on the lake on May 4, 1983.

On November 22, 1982, the seminary applied to DNR for a permit to construct a 500 foot radio tower in Jones Lake. The seminary requested a contested case hearing after DNR denied the permit.

An administrative law judge concluded Jones Lake was a "public water" before it was purchased, in part, by the seminary and even if it was not a public water at that time, the seminary had no existing right to build in the lake with a possible exception of two anchor piers which could support guy wires for a tower. He further found Jones Lake is a very valuable water and wildlife resource particularly because of its location in an urban area. He concluded that granting of a permit would violate Minn.Stat. § 105.42, subd. 1; Minn. Stat § 116D.04, subd. 6, and several rules and recommended that the Commissioner of Natural Resources deny the seminary's application for a permit. The Commissioner adopted the findings and conclusions and denied the permit. The seminary appeals from the Commissioner's order.

ISSUES

1. Does the seminary have an existing right under Minn.Stat § 105.38(1) to construct a radio tower in Jones Lake?

2. Was the Commissioner's decision supported by substantial evidence?

3. Has the seminary's property been taken for public use without just compensation?

ANALYSIS

1. The seminary contends it is not subject to DNR regulatory authority because it had a right to build a radio tower in Jones Lake before the lake was classified as a public water.

Minn.Stat. § 105.38(1) (1984) provides:

> Subject to existing rights all public waters and wetlands are subject to the control of the state.

The State and the seminary disagree about when Jones Lake became a "public water." However, they agree that at the time the seminary applied to DNR for a permit to build the tower in Jones Lake, it had been classified as a public water, more specifically a type 4 wetland.[1]

It is unnecessary for us to determine when Jones Lake became "public" in order to determine whether the seminary has an existing right to build a radio tower in Jones Lake. When a water is declared "public" it:

> * * * simply become[s] subject to the protection and control of the state under its regulatory scheme. The state exercises this control by virtue of its police power.

Pratt v. State Department of Natural Resources, 309 N.W.2d 767, 771 (Minn.1981). The seminary never "owned" Jones Lake.

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[1] Wetlands are limited to "types 3, 4, and 5 wetlands as defined in U.S. Fish and Wildlife Service Circular No. 39 (1971 edition), not included within the definition of public waters, which are ten or more acres in size in unincorporated areas or 2-1/2 or more acres in incorporated areas. Minn.Stat. § 105.37, subd. 15 (1984).

> One does not, at common law, have title to water in its natural state * * * . Water in its natural state is not property capable of being owned. Rather, one may have rights to the use and enjoyment of the water, rights exclusive of the general public, through ownership of lakeshore or lakebed. These rights the law calls riparian. One does not own the water; one owns riparian rights to the use and enjoyment of the water.

Id. 309 N.W.2d at 772 (citations omitted). The seminary, by reason of its ownership of lakeshore and lake beds, has riparian rights, It acknowledges that there are other riparian owners of Jones Lake.

Jones Lake is controlled by the State "subject to existing rights." Minn. Stat. § 105.38(1). These existing rights are the seminary's riparian rights. *See Pratt*, 309 N.W.2d 772. Riparian rights are those such as hunting, fishing, boating, sailing, irrigating, and growing and harvesting wild rice. *See Johnson v. Seifert*, 257 Minn. 159, 164, 100 N.W.2d 689, 694 (1960); *Pratt*, 309 N.W.2d at 772. A riparian owner:

> * * * has a right to make such use of the lake over its entire surface, in common with all other abutting owners, provided such use is reasonable and does not unduly interfere with the exercise of similar rights on the part of other abutting owners * * *

Johnson, 100 N.W.2d at 697.

When defining riparian rights, the court in *Johnson* did not extend the rights to "every pothole or swamp."

Id. That does not concern us. The Legislature has subsequently chosen to extend its control over wetlands, such as Jones Lake, subject to riparian rights. The *Johnson* court's definition of these rights is now applicable to the waters which are now subject to the protection and control of the State under its regulatory scheme.

Building a radio tower in water is not a riparian right. Further, such an obstruction would interfere with the exercise of riparian rights by other riparian owners. The Commissioner did not err by concluding the seminary had no existing right to build a radio tower.

The seminary contends the supreme court erred in *Pratt* by defining existing rights as riparian rights. It argues that Minn.Stat. § 105.38(1) expressly protects all existing rights without limitation and that it has an existing right to build a tower in Jones Lake which is similar to the right one has when one has a non-conforming use subject to local zoning requirements. A non-conforming use is an actual use. *See County of Pine v. State Department of Natural Resources,* 280 N.W.2d 625 (Minn.1979). The seminary's only use of Jones Lake was for an easement to Contemporary Radio for two anchor piers. The lake was not actually used for a radio tower. Thus, the seminary's non-conforming use argument lacks substance.

2. The seminary contends it is entitled to receive a permit under Chapter 105 and the applicable regulations.

It is unlawful for any private corporation to change the cross-section of any public waters by any means without a written permit from the Commissioner of Natural Resources, Minn.Stat. § 105.42, subd. 1 1984). A permit:

> * * * shall be granted * * * only when it will involve a minimum of encroachment, change, or damage to the environment, particularly the ecology of the waterway.

Minn.Stat. § 105.42, subd. 1a (1984).

> If the commissioner concludes that the plans of the applicant are reasonable, practical, and will adequately protect public safety and promote the public welfare, he shall grant the permit * * * . In all other cases the commissioner shall reject the application or he may require such modification of the plan as he deems proper to protect the public interest. In all permit applications the applicant has the burden of proving the proposed project is reasonable, practical, and will adequately protect public safety and promote the public welfare.

Minn.Stat. § 105.45 (1984). The Commissioner determined the seminary did not prove that the proposal is reasonable, practical or that it would promote public welfare.

More specifically the Commissioner concluded the placement of the tower would be detrimental to significant wildlife habitat, contrary to Minnesota Rule 6115.0210, subp. 3B. This section provides for the placement of structures in public waters and states:

> Placement of structures shall not be permitted where the structure: * * * [w]ill be detrimental to significant fish and wildlife habitat, or protected vegetation.

Minn.Rule 6115.0210, subp. 3B (1984).

The Commissioner also determined the proposal is subject to the provisions of the Minnesota Environmental

Policy Act, chapter 116D. Minn.Stat. § 116D.04, subd. 6 (1984), provides:

> Subd. 6. No state action significantly affecting the quality of the environment shall be allowed, nor shall any permit for natural resources management and development be granted, where such action or permit has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not justify such conduct.

The Commissioner concluded the seminary did not meet its burden under this section because there are reasonable and prudent alternatives to putting the tower in Jones Lake.

The parties initially disagree about which rules are applicable. The seminary argues the applicable rules are those which were in effect at the time it made its application. The State argues the applicable rules are those which were in effect at the time the Commissioner made his decision. The differences in the pertinent rules would not affect the outcome of this case. Nonetheless we note that Minn.Stat. § 105.44, subd. 9 (1984), provides:

> [e]xcept as otherwise expressly provided by law, every permit issued by the commissioner of natural resources * * * shall be subject to the following * * * (3) All applicable provisions of law existing at the time of the issuance of the permit or thereafter exacted by the legislature * * * .

There are rules currently in effect which are the same as those in effect at the time the Commissioner made his decision.

Our task is to determine whether the Commissioner's order was supported by substantial evidence or was arbitrary and capricious. In doing so we examine the administrative record to determine whether it contains relevant evidence which a reasonable mind might accept as adequate to support the Commissioner's findings and conclusions. *See In Re Plum Grove Lake,* 297 N.W.2d 130, 135 (Minn. 1980). We recognize an agency decision enjoys a presumption of correctness and that we should defer to its expertise. *Id.*

The seminary contends substantial evidence supports a public need for the radio tower and the public need outweighs adverse environmental impacts as required by 6 M.C.A.R. § 1.5023(F)(2)(a). Contrary to the assertion made by the seminary, the Commissioner made no conclusion with regard to this rule. He did not need to do so. It is inapplicable on its face. Further, we note it is no longer part of Minn. Rule 6115.0210 (1984). 6 M.C.A.R. § 1.5023(F)(2)(a) applies only to permits for new publicly sponsored structures and for the relocation of existing structures. The proposed tower is not publicly sponsored and it does not currently exist in Jones Lake.

The seminary next contends substantial evidence does not support the Commissioner's conclusion that the proposed tower will cause significant avaian mortality in violation of Minn. Rule 6115.0210, subp. 3B. This rule does not require a showing of significant avaian mortality but rather provides that a structure shall not be permitted in protected waters where the structure "will be detrimental to significant * * * wildlife habitat * * * ." The commissioner made such a finding. It is supported by substantial evidence.

Jones Lake is a 28 acre type 4 wetland. The evidence indicates that urban wetlands are very important because of their scarcity and Jones Lake is an important wildlife habitat for waterfowl in the Ramsey county area. There are 524.1 acres of type 4 wetland in Ramsey county making Jones Lake's acreage approximately five percent of the total in the county. There are 83.5 acres of type 4 wetlands in New Brighton making the Jones Lake acreage more than 30 percent of the total in New Brighton. There are relatively few wetlands on the western side of Roseville, New Brighton and Lauderdale.

Evidence indicates Jones Lake has a good waterfowl habitat and along with other metro wetlands is "fairly close to carrying capacity for waterfowl." Evidence further indicates that the proposed structure would cause numerous waterfowl to avoid the use of the site because the proposed radio tower and guy wires would extend over most of the marsh. However, there is no area for displacement because adjacent wetland habitat is close to carrying capacity.

Further, there is evidence showing that birds and waterfowl will collide with the tower and guy wires causing mortality. The larger birds will be particularly vulnerable as will be those taking off, landing, and in courtship.

Finally, evidence shows that it will take a period of two to three years for revegetation of the temporary road site needed to build the tower.

We find there is substantial evidence in the record which supports the commissioner's conclusion that the structure will be detrimental to significant wildlife habitat. Under the circumstances the Commissioner is precluded from issuing a permit.

The Commissioner also found the seminary did not meet its burden under Minn.Stat. § 116D.04(b). The seminary argues this statute is not applicable because this case does not involve a state action significantly affecting the quality of the environment or any permit for natural resources management or development. We need not address the issue to decide this case. Minn.Stat. § 116D.04(b) does not give the seminary any rights to a permit. Rather it provides further criteria which must be met when certain *state actions* are taken. Here the Commissioner was precluded from issuing a permit once he determined that the tower would be detrimental to a significant wildlife habitat. Therefore, it is unnecessary to consider additional criteria under Minn.Stat. § 116D.04(b), and we decline to do so.

Wetlands provide a unique natural ecosystem because they are capable of supporting a greater diversity of life than other habitats. *County of Freeborn v. Bryson,*

297 Minn. 218, 220, 210 N.W.2d 290, 293 (1973). The legislature's definition of wetlands includes type 4 wetlands which are two and one-half or more acres in incorporated areas but ten or more acres in unincorporated areas. The legislature has clearly expressed an intent to protect urban wetlands and it is our duty to support that goal. *See County of Freeborn by Tuveson v. Bryson*, 309 Minn. 178, 243 N.W.2d 316 (1976). We have no hesitation in doing so in this case.

3. The seminary contends DNR has taken its property for public use without just compensation. This issue has not been considered in any forum and there is no record for us to review on appeal. We decline to address the issue.

DECISION

The seminary does not have an existing right to build a radio tower in Jones Lake. The Commissioner's decision to deny a permit for the tower is supported by substantial evidence.

Affirmed.